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JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 933

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO MOTION TO DISMISS

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Appellee's Argument on Motion to Dismiss

Appellee's argument may be summarized briefly as follows: (1) The construction of the state statute is solely for the state court, (2) the statute—as construed by the state court—required Appellant to proceed by separate action rather than by motion, (3) such separate action had been available to Appellant at the time of his appointment and qualification as Committee of the Incompetent, (4) having improperly proceeded by motion, Appellant's time, under that statute, to proceed by action has expired, (5)

accordingly, having chosen the improper procedural remedy, no constitutional question was or could have been reached by the Court of Appeals and, therefore, there was and is no federal question to be reviewed by this Court.

Appellant's Reply

The tenuous character of Appellee's argument is demonstrated by the fact that these very points were raised by it on its initial motion to this Court to dismiss in the earlier appeal. It was decided adversely to the Appellee when probable jurisdiction was noted on November 7, 1955 (350 U. S. 882). Thereafter, Appellee, as well as the Attorney General of New York, in their respective Briefs on the merits, raised the very same points. Oral argument before this Court exhaustively dealt with these points too. In each instance, the decision of this Court on these points was definitive and adverse to Appellee.

The fact that the Court of Appeals, after the issuance of this Court's mandate to it, rendered an opinion incorporating the points and arguments of Appellee and the Attorney General does not minimize the tenuous nature of such argument.

This Court having spoken on these points, the State Court no longer had them before it for review.

For the State Court to hold that no federal question was properly presented is, in effect, in derogation of the judgment of this Court which was directly to the contrary. Furthermore, under the general decisional law, the matter was not a consideration of the State

Court. In *Lovell* v. *City of Griffin*, 303 U. S. 444 at Page 450, this Court held:

> "Whether it (a federal question) was so presented and was decided is itself a federal question."

See also:

> *Schuykill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121.

In *Honeyman* v. *Hanan*, 300 U. S. 14, this Court further held that the certificate or statement of the state court with respect to whether a federal question had been presented and passed upon is not controlling. While it may aid the Court, nevertheless, it cannot foreclose this Court's inquiry into the Record, so that its independent and conclusory determination thereof may be made. At Page 18 of 300 U. S., Mr. Chief Justice Hughes specifically stated the rule:

> "Before we may undertake to review a decision of the court of a state, it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause. Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54 and cases there cited. Whether these requirements have been met is itself a federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of

> the record. A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present."

Hence, when this Court stated on the prior appeal herein:

> "Our conclusion that the constitutional question was properly raised by appellant's motion is reinforced by the action of the Court of Appeals which amended its remittitur to disclose that a constitutional question was presented and necessarily decided on the appeal to that court. Manifestly, no constitutional question could have been reached, if the Court of Appeals had been of the opinion that the appellant had pursued the wrong remedy.",

and thereafter concluded

> "The question was appropriately raised and the issue improperly decided against the appellant.",

the State Court was foreclosed from any further consideration of the question.

* * * *

Not only the Appellee but also the State Court now recognize that the question of adequacy of notice had been conclusively determined by this Court. Nevertheless, Appellee persists in making much of its

already rejected contention that Appellant's only remedy was by separate action. The speciousness of such argument is manifested by its concession and admission on the argument of the prior appeal that the separate action would have availed Appellant nothing. To use the language of the Chief Justice:

> "If that were not enough, appellee, on oral argument, conceded that in an action of the sort contemplated by Section 165-h (7), the appellant would have been able to attack the deed only on the ground of alleged irregularities in the assessment and foreclosure proceedings."

Such action would have been but an empty gesture with the same result reached, to wit, a deprivation of the incompetent's property without due process.

Furthermore, if we are to follow the construction sought to be placed on the statute, the application of the two-year limitation within which an action may be brought results, in this case, in an unequal protection of the laws under the Fourteenth Amendment. Under the statute, as sought to be applied here, the two-year limitation is prescribed for all, regardless of whether the person whose property is being foreclosed is a known incompetent. Appellant, as Committee, was appointed and qualified subsequent to the commencement of the two-year period. He, therefore, was afforded a lesser or unequal time limitation. Suppose the Committee had been appointed but a day or two before the two-year period had run out? Suppose the Committee had been appointed after the two-year period had expired?

The burden had been on the Appellee to have had a guardian or other proper person appointed to

receive the process or notice on behalf of such known incompetent before any such proceeding and limitation statute could start running against her.

* * * *

Appellee refers to the state of tax titles and the law of tax foreclosure in New York and it contends that confusion may result. The answer to that is, that it creates no more confusion than do the orderly processes of the law with respect to any proceedings whether they deal with decedents' estates, common trust funds, property or individual liberty. The legislature by statute, or in the absence of legislative fiat, the Courts, by rule of law, have consistently required the appointment of one to receive process or notice on behalf of a person known to be incapable of understanding the nature of the proceedings then sought to be instituted. The fact that the instant statute makes no specific provision for the appointment of such person to protect a known incompetent from being deprived of her property, does not justify violation of the basic and fundamental concept that due notice must be afforded. The taking of a person's property without due process is never justified on the basis of expediency.

Strict compliance with the statute did not afford notice to Nora Brainard, an unprotected known incompetent, and the taking of her property under the circumstances was without due process of law. The State Court upon the remand had no other alternative but to set aside the proceedings against her and void the deed.

This Court had decided that the incompetent had a federal right which had been denied her by the

Appellee and State Court. The State Court's action on the remand, again denying her that right, in face of the mandate, once again poses a federal question for determination by this Court.

* * * *

The other matters and points raised in Appellee's motion to dismiss are covered in our Jurisdictional Statement.

Respectfully submitted,

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